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Case #_____

SUPREME COURT OF THE UNITED STATES

October Term, 1991

JOHN J. STANTON,
Petitioner

v

DISTRICT OF COLUMBIA
COURT OF APPEALS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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****

QUESTIONS PRESENTED

1. Under the "Assistance of Counsel" Clause of the Sixth Amendment to the Federal Constitution, may counsel articulate guilty pleas for the accused and advocate acceptance of their pleas as voluntary?

2. May "the canons of ethics" be construed, under the "Freedom of Speech" Clause of the First Amendment to the Federal Constitution, to impose on counsel for the accused the duties to articulate guilty pleas and to convince judges of their voluntariness?

3. Do principles of res judicata preclude issues litigated but not resolved in previous proceedings?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iv
Opinions Below	ix
Jurisdiction	ix
Constitutional Provisions, Statutes, Regulations Involved	x
Statement of the Case	1
Petitioner's Practice of Criminal Law	2
Respondent's Disciplinary Proceedings against Petitioner	3
Proceedings on Petitioner's Applications for Reinstatement	9
Argument	17
Respondent's Construction of the Disciplinary Rules Violates the Sixth Amendment Guarantee of Assistance of Counsel for Defense	18
Respondent's Construction Violates the First Amendment Guarantee of Freedom of Expression	28

TABLE OF CONTENTS

(continued)

Page

Respondent's Construction has been Shielded from Legal Challenge by Misuse of the Res Judicata Doctrine ---------- 35

Conclusions ---------- 41

Appendix:

Per curiam and Dissenting Opinions of the District of Columbia Court of Appeals in Case #88-1492, In re John J. Stanton, Petitioner, Decided 18 April 1991 ---------- 1A

Text of 2 October 1991 Order of the District of Columbia Court of Appeals Denying Rehearing in Case #88-1492 ---------- 15A

TABLE OF AUTHORITIES

Page(s)

Cases:

Addington v Texas, 441 US 418, 99 SCt 1804 (1979) ---------- 38

Allen v McCurry, 449 US 90, 101 SCt 411 (1980) ---------- 37

Arizona v California, 460 US 605, 103 SCt 1382 (1983) ---------- 36

Armstrong v Manzo, 380 US 545, 85 SCt 1187 (1965) ---------- 5

Boykin v Alabama, 395 US 238, 89 SCt 1709 (1969) ---------- 25

Brown v Felsen, 442 US 127, 99 SCt 2205 (1979) ---------- 39, 41

Consolidated Edison Co. v Public Service Commission of New York, 447 US 530, 100 SCt 2326 (1980) --- 30, 34

Hill v Lockhart, 474 US 52, 106 SCt 366 ---------- 25

Johnson v Zerbst, 304 US 458, 58 SCt 1019 (1938) ---------- 25

Kercheval v United States, 274 US 220, 47 SCt 582 (1927) --------- 24

TABLE OF AUTHORITIES

(continued)

	Page(s)
Lowe v Securities and Exchange Commission, 472 US 181, 105 SCt 2557 (1985)	30
McCarthy v United States, 394 US 459, 89 SCt 1166 (1969)	15 25
McCoy v Court of Appeals of Wisconsin, District 1, 486 US 429, 108 SCt 1895 (1988)	20
Minick v United States, 506 A2d 1115 (DC 1986)	13
Mitchell v United States, 104 USAppDC 57, 259 F2d 787 (1958)	3
Montana v United States, 440 US 147, 99 SCt 970 (1979)	37
Near v Minnesota, 283 US 697, 51 SCt 625 (1931)	32 33
Police Department of Chicago v Mosley, 408 US 92, 92 SCt 2286 (1972)	31
Polk County v Dodson, 454 US 312, 102 SCt 445 (1981)	9
In re Ruffalo, 390 US 544, 88 SCt 1222 (1968)	38

TABLE OF AUTHORITIES

(continued)

	Page(s)
Schware v Board of Bar Examiners, 353 US 232, 77 SCt 752 ----------	30
Simon & Schuster, Inc. v New York State Crime Victims Board, 60 USLW 4029 (US 10 December 1991) ----------	32
In re Stanton, 470 A2d 272 (DC 1983) ----------	7 8
In re Stanton, 470 A2d 281 (DC 1983), cert denied 466 US 972, 104 SCt 2347 (1984) -------	5 6 7
Matter of Stanton, 532 A2d 95 (DC 1987) ----------	10 27
In re Stanton, 589 A2d 425 (DDC 1991) ----------	13 14 15 35
United States v Broce, 488 US 563, 109 SCt 757 (1989) ----------	21 25
United States v Cronic, 466 US 648, 104 SCt 2039 (1984) ----------	20

TABLE OF AUTHORITIES

(continued)

	Page(s)
Wallace v Jaffre, 472 US 38, 105 SCt 2479 (1985)	31
Wheat v United States, 486 US 153, 108 SCt 1692 (1988)	19 20
Constitutional Provisions, Statutes, Regulations, etc.:	
United States Constitution:	
Amendment I	29 30 31
Amendment VI	19 20 28
District of Columbia Code (1981), Section 11-2501	1
District of Columbia Superior Court, Rules of Criminal Procedure:	
Rule 11(d)	14 33
District of Columbia Rules of Professional Conduct (1991):	
Rule 1.3(b)(1)	29

TABLE OF AUTHORITIES

(continued)

	Page(s)
District of Columbia Code of Professional Responsibility (1972-1991):	
Disciplinary Rule DR6-101(A)(3) -	4 28 40
Disciplinary Rule DR7-101(A)(1) -	4 28 40
District of Columbia Court of Appeals, Board on Professional Responsibility, Board Rules (1983, 1988 Update):	
Rule 7.13 ----------	5
American Heritage Dictionary of the English Language (W. Morris ed. 1981) ----------	26
Gellman, "DC Law: A Judge's-Eye View of the Legal System," Washington Post Magazine, 17 November 1991, at 10 ----------	23
McDonald, "Judicial Supervision of the Guilty Plea Process: A Study of Six Jurisdictions," Judicature, Vol. 70, No. 4 (Dec.-Jan. 1987) 203 ----------	27

OPINIONS BELOW

Copies of the per curiam and dissenting opinions of the District of Columbia Court of Appeals, reported as In re Stanton, 589 A2d 425 (1991), are appended to this petition.

JURISDICTION

Jurisdiction is invoked under U.S.C. (1988) Section 28-1257 for review of the 18 April 1991 judgment of the District of Columbia Court of Appeals in Case #88-1492 made final by the 2 October 1991 order denying rehearing.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

"Congress shall make no law ... abridging the freedom of speech," **United States Constitution, Amendment I.**

"In all criminal prosecutions, the accused shall ... have the assistance of counsel for his defense," **United States Constitution, Amendment VI.**

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of ... property without due process of law," **United States Constitution, Amendment XIV.**

"Insuring that the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

(continued)

court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the prosecutor and the defendant or the defendant's attorney," **District of Columbia Superior Court, Rules of Criminal Procedure, Rule 11(d).**

"A lawyer shall not intentionally ... [f]ail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules," **District of Columbia Rules of Professional Conduct (1991), Rule 1.3(b)(1).**

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

(continued)

"A lawyer shall not ... [n]eglect a legal matter entrusted to him," **District of Columbia Code of Professional Responsibility (1972, superseded 1991), Disciplinary Rule DR6-101(A)(3).**

"A lawyer shall not intentionally ... [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law," **District of Columbia Code of Professional Responsibility (1972, superseded 1991), Disciplinary Rule DR7-101(A)(1).**

"All motions directed to the manner in which the hearing is to be conducted shall be ruled upon by the hearing committee chair or the chair's designee either at a pre-hearing conference as provided in Rule 7.14 or at the time of the hearing. In a

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

(continued)

case of a motion directed to the admissibility of evidence, the evidence, if oral, shall be heard by the hearing committee and, if documentary, shall be included in the record, and the hearing committee shall include in its report to the board a recommendation for disposing of the motion, except that if the hearing committee chair determines that the evidence is privileged, irrelevant, or merely cumulative, the chair may exclude the evidence after allowing the proponent to make a proffer on the record. As to all other motions, the hearing committee shall include in its report to the board a proposed disposition and the reasons therefor. The board shall rule on all such motions in its disposition in the case,"

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

(continued)

District of Columbia Court of Appeals, Board on Professional Responsibility, Board Rules (1983, updated 1988), Rule 7.13.

SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR WRIT OF CERTIORARI TO
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STATEMENT OF THE CASE

Petitioner, an attorney, was admitted to practice by respondent, highest court in the District of Columbia (DC), with authority under DC Code (1981) Section 11-2501 to make "such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar and their censure, suspension, and expulsion." For his "view of his role as a lawyer" in criminal prosecutions, respondent has suspended and refused to

reinstate petitioner's bar membership.

Petitioner's Practice of Criminal Law

In criminal prosecutions, petitioner has developed a practice modeled on the constitutional guarantee to the accused of "assistance of counsel for his defense." Petitioner construes the guarantee as constraining him from assisting the accused in articulating pleas of guilty and waiving his right to defend himself. When appointed or retained to represent persons accused of crimes, petitioner negotiates with the prosecutors to obtain the best guilty plea offers possible, discusses the offers thoroughly with the accused, and advises them, always, whether to accept or reject the offers. He further advises his clients that, if they decide to accept the offers, to speak up in court to inform judges of their decisions; otherwise, he advises them, he will pursue the best result--

dismissal or acquittal of the charges--as the default option.

Respondent's Disciplinary Proceedings against Petitioner

Respondent, by the DC Bar disciplinary authority, admonished petitioner to assist the accused not only as advisor for their consideration of plea offers but also as advocate for acceptance of their guilty pleas. When petitioner protested that there is no lawful authority for such an admonition, respondent prosecuted disciplinary charges against him.[1]

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[1]Respondent initiated the prosecution by reopening proceedings on a dismissed complaint, then proceeded on two more complaints, and solicited a fourth. Previously, several complaints from dissatisfied clients had been dismissed after inquiry. Such complaints are not unusual: "It has been repeated so many times as to become axiomatic that convicted felons almost unanimously relish the prospect of putting to public judicial test the competence of their erstwhile defenders," Mitchell v United States, 104 USAppDC 57, 61, 259 F2d 787, 791 (1958). The axiom is an occupational hazard of criminal law practice.

Respondent charged petitioner with violations of DC Code of Professional Responsibility disciplinary rules DR6-101(A)(3)[2] and DR7-101(A)(1).[3] Petitioner moved to dismiss the charges as vague, overbroad, and ex post facto, raising the due process issue of fair notice. Respondent refused to resolve the issue before the factfinding stage of the disciplinary proceedings. Respondent ruled that,

> [The factfinding] committee is to recommend ... what disposition should be made of any motions ... Recommendations both as to the ultimate disposition on the merits and as to any motions are then made ... upon the basis of a fully developed factual record.
>
> * * * * * * * *

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[2]DR6-101(A)(3): "A lawyer shall not ... [n]eglect a legal matter entrusted to him."

[3]DR7-101(A)(1): "A lawyer shall not intentionally ... [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law."

> While [Respondent] would have no hesitation in [dismissing] a case in which the [attorney] was not fairly notified of the charges against him because the petition was so inadequate as not to allow him to know with what he was charged, that determination is made [following factfinding] so that any possible objection ... can be considered together with the factual record in the case.

In re Stanton, 470 A2d 281, 285 (DC 1983), cert denied, 466 US 972, 104 SCt 2347 (1984).[4] Petitioner challenged this motions procedure for denying him an opportunity to be heard on the fair issue notice "at a meaningful time and in a meaningful manner;"[5] respondent ignored the challenge.[6]

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[4]Respondent's ruling on motions procedure in disciplinary proceedings was adopted as DC Board on Professional Responsibility Rule 7.13 (see page viii infra for text).

[5]Citing Armstrong v Manzo, 380 US 545, 552, 85 SCt 1187, 1191 (1965).

[6]Abrogating "procedural due process protections ... [as] inappropriate in the disciplinary system," Stanton, supra, 470

(continued...)

Following factfinding in which what was relevant to proof and disproof of violations was unclear, respondent did not dismiss the case against petitioner but had no hesitation in ruling[7] that he violated the disciplinary rules "when he refused to file a ... motion on behalf of his client in the face of her direct instruction to do so," Stanton, 470 A2d at 286; when he informed a judge hearing a guilty plea that he had advised his client that the plea was "improvident and unwise," Id at 288; when he "failed to investigate the case, as charged," Id at 289; when he "failed to file a ... motion when requested to do so

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[6](...continued)
A2d at 285, respondent never addressed or ruled on the constitutional due process issues raised in petitioner's motion to dismiss the charges.

[7]Respondent ruled against petitioner by summarily adopting the reports and recommendations of the bar disciplinary authority and ignoring petitioner's opposing briefs and arguments.

by his client, failed to communicate in any significant fashion with his client, [and] failed to investigate the facts of his client's case," In re Stanton, 470 A2d 272, 275 (DC 1983); and when, "in direct contravention of his client's often-repeated desire to plead guilty, [he] refused in open court to take any affirmative action to further his client's desires," Id at 276.

Respondent ruled that petitioner "owes his clients an obligation to pursue their objectives as they see them," Id at 276, that he "may not substitute his own judgment for that of the client," Id at 277, but has a "duty of fidelity to the client's judgment," Stanton, 470 A2d at 289. Respondent found that petitioner "arrogates to himself the role of decision-maker in his representation of his clients," Stanton, 470 A2d at 278, "keep[s]

his clients largely in the dark about the progress of their cases," Ibid, has an "arrogant and abusive manner toward his clients," Id, and "does not seem to have the slightest doubt about the correctness of his behavior," Id at 279. Although no actual or theoretical harm to any client had been shown in the disciplinary proceedings and although petitioner had no record of previous violations of the disciplinary rules, respondent ordered indefinite suspension from the practice of law for petitioner's "cohesive although ... completely erroneous view of his role as a lawyer," Id at 281, with reinstatement only upon proof of fitness and rehabilitation, clear and convincing to respondent's satisfaction, "to force [petitioner] to justify his readmission to active practice," Ibid.

Proceedings on Petitioner's Applications for Reinstatement

When petitioner first applied for reinstatement, he moved to vacate the unconstitutional suspension order as the essence of arbitrary action representing "an external effort to direct how the obligations to the client are to be carried out."[8] Alternatively treating respondent's rulings as valid law, petitioner pledged to file motions whenever requested by clients, not to inform judges of advice to clients to reject government plea offers, to investigate cases thoroughly, and to be more tactful and diplomatic in communicating with clients. But he pleaded that his practice of allowing clients to articulate their guilty pleas personally is consistent with both the constitutional duty to assist them in defending themselves

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[8]Citing Polk County v Dodson, 454 US 312, 327, 102 SCt 445, 454 (1981).

and the duty of "fidelity to the client's judgment" imposed by respondent in the disciplinary proceedings against him.

Respondent refused to vacate the suspension order, ruling that "petitioner is precluded from challenging the constitutionality of the earlier disciplinary proceedings," Matter of Stanton, 532 A2d 95, 96 (DC 1987), because "principles of res judicata bar relitigation of a defense which was or might have been raised in [a] previous action," Ibid. Respondent then denied reinstatement because "petitioner refuses to acknowledge or appreciate the seriousness of his misconduct," Id at 97. He would not agree "[to] assume the role of an advocate for ... client[s] who desire[] to plead guilty," Ibid, but "would act no differently from the way he did before with regard to guilty pleas," Id at 98.

Petitioner applied again for reinstatement. Again he argued that respondent's unconstitutional suspension order should be vacated, and, while pledging to honor and abide by respondent's construction of the disciplinary rules and to avoid violations of which he has notice, he could not agree to become an advocate for guilty pleas. Perceiving a conflict between respondent's overbroad construction and the constitutional duty to assist the accused in defense, petitioner argued that his willingness to carry out the disciplinary rules must yield to his oath as an attorney to uphold and defend the constitution.

Respondent's factfinding committee appointed for the reinstatement proceedings on petitioner's application found that in the disciplinary proceedings against him,

> Petitioner strongly but unsuccessfully contested the findings

> ... arguing at each phase of the disciplinary process that [he] was disciplined without fair notice for conduct which was made misconduct ex post facto.

The factfinding committee found and reported to respondent that,

> Petitioner states he would not personally articulate the guilty plea of a client ... Nor would petitioner personally take any action to convince a judge of the voluntariness of a guilty plea of a client ...

Respondent's committee concluded that,

> While one may disagree with petitioner's view of his role in this context, we do not find his position as he has now framed it to be irresponsible, necessarily inconsistent with his obligations under the disciplinary rules, or in conflict with the rules of criminal procedure.
>
> * * * * * * * *
>
> ... Petitioner deserves to be reinstated. The ... committee was impressed with how strongly petitioner holds the belief that there is a constitutional basis for his refusal to enter a guilty plea. He appears to have given significantly more thought to this aspect of defense litigation than many practicing attorneys; and he seems prepared to hold to that belief

in the face of all odds.

The committee recommended reinstatement, but respondent ruled that "petitioner's request for reinstatement is foreclosed by principles of res judicata," In re Stanton, 589 A2d 425, (DC 1991), infra 1A-2A, because "the decision of the court denying his first petition for reinstatement is ... binding on this division of the court," Ibid, infra 2A.[9] Otherwise, respondent ruled,

> petitioner could continually apply to the court for reinstatement while adhering to an understanding of his

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[9]Under DC case law, a three-judge division of the Court of Appeals may not overrule a prior decision of another division, Minick v United States, 506 A2d 1115, 1116-1117 (DC 1986). The division also ruled that, "Even if principles of res judicata did not bar petitioner's application, ... petitioner has not met his burden of proof with respect to the other [reinstatement] factors," 589 A2d at 426-427, infra 4A-5A, "the attorney's conduct since discipline was imposed, ... the attorney's present character, ... and ... the attorney's present qualifications and competence to practice law," Ibid.

> obligation which the court has found contrary to the duties imposed by the canons of ethics on an attorney representing a criminal defendant.

Id at 426, infra 4A. In respondent's opinion, the duty "[to] assume the role of an advocate for a client who desire[s] to plead guilty ... include[s] advocating in open court" "to convince a judge of the voluntariness of [the] guilty plea ... during a Rule 11(d) inquiry," Ibid, infra 3A.[10] "That petitioner acknowledged his duties to advise his clients who wished to plead guilty, to participate in plea negotiations with the prosecutor, and to insure that any plea offer was clearly set forth on the record, but that he would not personally articulate the guilty plea of a client in court and would not personally take any action to convince a judge of the

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[10]See pages vi-vii supra for the text of DC Superior Court criminal procedure Rule 11(d), which is similar to Rule 11 of the Federal Rules of Criminal Procedure.

voluntariness of a guilty plea," Id, infra 3A, is insufficient to meet respondent's reinstatement standard.[11]

Petitioner then requested rehearing by the division and by the full court en banc, arguing that counsel who persuade their clients to plead guilty should not be obligated to persuade the courts that the clients' pleas are voluntary, for counsel, unable to monitor the defendant's state of mind, which must be constantly subject to change, necessarily "resorts to assumptions"[12] in advocating findings of voluntariness and guilt. Petitioner warned

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[11]In dissent, one member of respondent's division stated that, "A defense lawyer who as a matter of routine personally speaks to convince the court of the voluntariness of a plea of guilty himself walks a tight rope on the periphery of ethical conduct. The issue in the final analysis may well be whether the request of his client is lawful or rational," 589 A2d at 489, infra 11A.

[12]Citing McCarthy v United States, 394 US 459, 89 SCt 1166 (1969).

that advocacy for guilty pleas subverts the adversarial system of criminal justice and should not be made obligatory but should be proscribed if recognized officially under the Rules of Professional Conduct.

Respondent ordered the DC Bar disciplinary authority to respond to petitioner's request for rehearing. The response argued that "petitioner's belief that he is not legally obligated to assist his client in entering a guilty plea shows that he does not appreciate the seriousness of that aspect of his misconduct" and, further, that "the division independently found that petitioner had failed to satisfy any of the [reinstatement] factors necessary to demonstrate ... fitness to resume the practice of law." The "core issue in this reinstatement proceeding," according to the response, is "petitioner's overall fitness to resume the practice of

law," not the correctness of imposing on counsel the duties to articulate guilty pleas and to assume the role of advocate for findings of voluntariness and guilt. Because ground exists for denying petitioner's reinstatement independent of the ruling on advocacy for guilty pleas, the response concluded, rehearing should be denied.

Respondent then denied rehearing, and this petition followed.

ARGUMENT

The issue of petitioner's personal fitness for practice as a member of respondent's bar is not a question presented for review. It is necessary to review respondent's judgment not to redress respondent's injustices to petitioner but to correct respondent's erroneous,

unconstitutional rulemaking that obligates DC attorneys to become advocates for their clients' guilt in criminal prosecutions and denies them procedural due process in DC bar disciplinary proceedings. Whether petitioner ever gains reinstatement is beside the point that these pervasive violations of the federal constitution should not be allowed to stand.

Respondent's Construction of the Disciplinary Rules Violates the Sixth Amendment Guarantee of Assistance of Counsel for Defense

Respondent's perceptions of "client[s] who desire to plead guilty" "request[ing]" that their lawyers "personally speak[] to convince the court[s] of the voluntariness of [their] pleas of guilty" is delusional. The plain truth is that the accused never "desire" to plead guilty, and they never ask their lawyers to help them convince judges of their guilt. The accused also know or sense that they have a right to

defend themselves, guilty or not, in an adversarial system of criminal justice and that counsel should assume the role of advocate for their presumed innocence.

Their sense of the system is accurate in theory, for "the essential aim of the [Sixth] Amendment is to "guarantee an effective advocate for each criminal defendant," Wheat v United States, 486 US 153, 159, 108 SCt 1692, 1697 (1988), by "providing assistance of counsel ... to ensure that criminal defendants receive a fair trial," Id at 159, 108 SCt at 1696-1697. The Sixth Amendment requires "not merely the provision of counsel to the accused but 'Assistance,' which is to be 'for his defense.' Thus, the core purpose of the counsel guarantee [is] to assure 'Assistance' at trial, when the accused [is] confronted with both the intricacies of the law and the advocacy of the public

prosecutor," United States v Cronic, 466 US 648, 654, 104 SCt 2039, 2044 (1984). "[T]he adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of advocate," Id at 656, 104 SCt at 2045, "to assure fairness in the adversary criminal process," Wheat, 486 US at 158, 108 SCt at 1696.

Respondent misapprehends or distorts counsel's role as advocate under the Sixth Amendment. A guilty plea plays no part in the adversary criminal process, in which counsel's obligation is "to maintain that the stigma of guilt may not attach to the client until the presumption of innocence has been overcome by proof beyond a reasonable doubt," McCoy v Court of Appeals of Wisconsin, District 1, 486 US 429, 435, 108 SCt 1895, 1900 (1988). "A plea of guilty and the ensuing conviction

comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt," United States v Broce, 488 US 563, 569, 109 SCt 757, 762 (1989).

The constitutional guarantee that the accused shall have "assistance of counsel for his defense" is difficult to effectuate in the most favorable circumstances, when the prosecution presents a weak case against a resourceful accused able to retain skilled, experienced counsel. When the prosecutor's case against an indigent accused is strong, effectuation is a daunting challenge for appointed counsel.

Facing probable defeat at trial for limited remuneration, most attorneys have little difficulty rationalizing efforts to induce the accused to plead guilty and waive their right to defend themselves. If they are in fact guilty, nothing can be

gained in defending a lost cause; and if by pleading guilty they can reduce their exposure to punishment at sentencing from what it would be following a lost trial, advice and inducements to plead guilty are services in their interests and for their benefit; and if it is necessary to argue and to remonstrate with them, even to frighten and intimidate and manipulate them, to convince them that they should not defend themselves in court, such tactics are justified for that purpose, according to the common rationale.

In respondent's domain, pressure to plead guilty reportedly is applied often in attorney-client conferences:

> Which brings up another delicate form of legal negotiation, the one between lawyer and client. Supposedly shrouded by the solemn secrecy of attorney-client privilege, it is frequently on open display in courthouse corridors. Often enough, it is highly unflattering to the lawyer.

> A young man, obviously a defendant, stands silently outside the fourth-floor felony clerk's office ... The kid faces three felony drug charges, and his lawyer, seeking to avoid a trial, is attempting to scare him into pleading guilty to one of them. It seems to be working. The kid, barely making a gesture, lets the monologue wash over him like a wave.
>
> "They're going to want to give you the mandatory minimum, which is 20 years," the lawyer says ... It's going to take some serious negotiating to get you 20 months" ... "Now if I was you, I'd go ahead and get it over with, because 20 months you can do standing on your head. But even if you get convicted on one of these, you're looking at 25 years. You're going down on one of these three, you understand that, right?
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> The lawyer pauses, already thinking ahead to the sentencing.

Gellman, "DC Law: A Judge's-Eye View of the Legal System," Washington Post Magazine, 17 November 1991, at 10, 29. Under respondent's construction of "the canons of ethics," the lawyer who scares the defendant into agreeing to plead guilty has the duties to articulate the plea, take affirmative action to further his client's

instilled "desire" to plead guilty, and assume the role of advocate to convince the judge of the voluntariness of the plea.

Advocacy for guilty pleas is a pernicious practice that subverts the constitutional guarantee of assistance of counsel for defense. That the practice may be common, even widespread, is no reason for respondent to require it. Advocacy for a binding, final judgment of guilt is the role of the prosecutor, the adversary of the accused. Counsel for the accused assist them properly in the role of advisor on decisions whether to accept plea bargains negotiated by counsel. All reported decisions on motions to withdraw guilty pleas recognize counsels' assistance in this role.[13] As advisors, counsel ensure

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[13]Guilty pleas must be "made voluntarily after proper advice," Kercheval v United States, 274 US 220, 223, 47 SCt 582, 583 (1927), "equally voluntary and knowing,"

(continued...)

the voluntariness of guilty pleas, "the long-standing test for ... validity," Hill v Lockhart, 474 US 52, 56, 106 SCt 366, 369 (1985); as advocates, counsel corrupt the voluntariness and the validity of guilty pleas.

"Voluntary" means "arising from one's own free will, acting on one's initiative," "acting willingly," "normally controlled by or subject to individual volition," "capable of exercising will, volitional," "proceeding from impulse, spontaneous," or "acting or performed without external

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[13](...continued)
McCarthy v United States, 394 US at 466, 89 SCt at 1171, "voluntary and intelligent," Boykin v Alabama, 395 US 238, 242, 89 SCt 1709, 1711 (1969), and "both counseled and voluntary," United States v Broce, 488 US at 569, 109 SCt at 762. To be valid waivers of the constitutional right to self-defense, guilty pleas must be "intentional relinquishment[s] or abandonment[s] of ... known right[s] or privilege[s]," Johnson v Zerbst, 304 US 458, 464, 58 SCt 1019, 1023 (1938); hence, the necessity of "proper advice" from counsel.

pressure or compulsion."[14] Most guilty pleas hardly fit any of these definitions. Typically, counsel, not the accused, initiate the process by announcing plea bargains. Counsels' announcements exert external pressure on the accused to conform to expectations and not to offend with equivocations, hesitations, and second thoughts. If, in addressing the courts, the accused reveal unwillingness to admit that they committed the crimes charged against them, counsel intercede with explanations for their evident lack of volition and with arguments for findings of factual bases for the pleas to make them acceptable. In most cases, the accused ultimately acquiesce in the plea bargain, whatever their true feelings about guilt, rather than contradict their counsel and risk

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[14]American Heritage Dictionary of the English Language 1436 (W. Morris ed. 1981).

aggravating the courts.[15]

Innocent or guilty, the accused have the constitutional right to assistance of counsel for their defense. They may waive the right voluntarily with proper advice from counsel, but their waivers may not be voluntary if advocated by counsel.[16]

For these reasons, petitioner truly believes "there is a constitutional basis

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[15]"In interviews with non-random samples of defendants who had pleaded guilty, it was found that most defendants (77%) felt they had to accept the plea agreement. Half the defendants reported that their attorneys advised them how to answer the questions at plea taking. In several cases, the advice was to say "yes" to everything," Stanton, supra, 532 A2d at 100, citing McDonald, "Judicial Supervision of the Guilty Plea Process: A Study of Six Jurisdictions," Judicature, Vol. 70, No. 4 (Dec.-Jan. 1987) at 203, 211.

[16]Ironically, respondent's construction may offer to those unwilling to admit culpability and consequently convicted in trials on the merits new ground to challenge their convictions by alleging ineffective assistance in counsels' insufficient advocacy for acceptance of their guilty pleas to reduced charges.

for his refusal to enter a guilty plea," and he is "prepared to hold to that belief in the face of all odds" until convinced that his "view of his role as a lawyer" in criminal prosecutions is "erroneous," as respondent has ruled. Respondent's unique, unprecedented construction of the disciplinary rules and evasion of the Sixth Amendment issue have not been convincing, but petitioner believes that respondent's unconstitutional construction subverts and does great harm to the adversarial system of criminal justice.

Respondent's Construction Violates the First Amendment Guarantee of Freedom of Expression

Respondent construes "the canons of ethics"[17] to impose on attorneys

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[17]The term must refer to either the DC Code of Professional Responsibility, under which respondent charged petitioner with violations of DR6-101(A)(3) and DR7-101(A)(1), or the superseding DC Rules of Professional Conduct, which took effect on

(continued...)

representing criminal defendants the duties to articulate guilty pleas for their clients and to advocate in open court to convince judges of the voluntariness of such pleas. Respondent clearly intends to exclude from the practice of law attorneys who, like petitioner, believe that the construction violates the Sixth Amendment duty to assist the accused in defending themselves. The question is whether respondent's power to license and regulate those who would practice law collides in this construction with their right to freedom of expression guaranteed by the First Amendment.

"Regulations on entry into a profession ... are constitutional if they have a

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[17](...continued)
1 January 1991. Respondent now evidently construes the present Rule 1.3(b)(1) to obligate counsel to articulate guilty pleas and to argue their voluntariness convincingly.

rational connection with the applicant's fitness or capacity to practice the profession," Lowe v Securities and Exchange Commission, 472 US 181, 228, 105 SCt 2557, 2582 (1985) (concurring opinion), citing Schware v Board of Bar Examiners, 353 US 232, 239, 77 SCt 752, 756 (1957), but "a lawyer's work is almost entirely devoted to the sort of communicative acts that ... fall within the First Amendment's protection," Lowe, 472 US at 228, 105 SCt at 2582, and a regulation of speech "motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a law abridging the freedom of speech," Consolidated Edison Co. v Public Service Commission of New York, 447 US 530, 546, 100 SCt 2326, 2338 (1980), if "above all else, the First Amendment means that

government has no power to restrict expression because of its message, its ideas, its subject matter, or its content," Police Department of Chicago v Mosley, 408 US 92, 95, 92 SCt 2286, 2290 (1972).

Wielding power to license and regulate attorneys, respondent would abridge their freedom of speech in guilty plea practice. Under the First Amendment, "the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind," Wallace v Jaffre, 472 US 38, 52, 105 SCt 2479, 2487 (1985), yet respondent would compel members of the DC Bar to speak for their clients according to an unconstitutional construction of the Rules of Professional Conduct and would restrict their expression and practice of contrary, constitutional views of counsel's roles of advisor and advocate in the adversarial

system of criminal justice.

Respondent's construction of the disciplinary rules "must be tested by its operation and effect," Near v Minnesota, 283 US 697, 708, 51 SCt 625, 628 (1931). It clearly operates to promote disposition of criminal prosecutions in DC courts by guilty pleas with corrupting effect on the voluntariness of such dispositions. No rational connection with fitness or capacity to "ensure that criminal defendants receive a fair trial" is apparent.

In Simon & Schuster, Inc v New York State Crime Victims Board, 60 USLW 4029, 4032 (US 10 December 1991), regulation of content was recognized if "necessary to serve a compelling state interest and ... narrowly drawn to achieve that end," or in "situations presenting some grave and imminent danger the government has the

power to prevent," Id at 4035 (concurring opinion), citing Near v Minnesota, 283 US at 716, 51 SCt at 631. Respondent's construction of the disciplinary rules cannot be recognized by this measure.

Under the Sixth Amendment, the compelling state interests are to ensure that criminal defendants receive fair trials and that their guilty pleas be voluntary. Construing the disciplinary rules to require counsels' advocacy for guilty pleas serves neither constitutional interest, nor is the construction a necessary remedy for some grave and imminent danger respondent has the power to prevent. Respondent perceives "clients who desire to plead guilty" but who cannot convince the courts that they are guilty by addressing the judges personally as required by Rule 11. The danger in such situations is that their guilty pleas will

not be accepted, and they will stand trial on the charges against them. Trials, if they are fair, are not dangers respondent has the power to prevent.[18]

For these reasons, respondent's findings of "duties imposed by the canons of ethics" on attorneys to assume the role of advocate for clients who desire to plead guilty, to articulate their guilty pleas, and to convince judges of the voluntariness of their pleas construe the DC Rules of Professional Conduct unconstitutionally to abridge freedom of speech and restrict expression of ideas in order to promote

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[18]Respondent may perceive a danger of harm to the accused who fail to admit guilt and then receive following trials sentences more severe than what might have been imposed on their pleas. Assuming guilty verdicts and aggravating sentencing factors, this perception is speculative. "Mere speculation of harm does not constitute a compelling state interest," Consolidated Edison v Public Service Commission, supra, 447 US at 543, 100 SCt at 2336.

dispositions of criminal prosecutions by guilty pleas.

Respondent's Construction has been Shielded from Legal Challenge by Misuse of the Res Judicata Doctrine

Respondent rules that because he has not "recognized the seriousness of the misconduct that resulted in his suspension," Stanton, 589 A2d at 425, infra 2A, "petitioner's request for reinstatement is foreclosed by principles of res judicata," Id, infra 1A-2A. Previously, "in addressing petitioner's challenge to the fairness of the proceedings leading to his suspension, [respondent] accepted the rule that principles of res judicata apply in bar discipline cases ... to prevent litigation of defenses raised ... in prior disciplinary proceedings," Id at 426, infra 4A. Respondent resorts to the res judicata doctrine to continue the evasion of constitutional issues it refused to resolve

in the original disciplinary proceedings.

If "res judicata and collateral estoppel do not apply if a party moves the rendering court in the same proceeding to correct or modify its judgment," Arizona v California, 460 US 605, 619, 103 SCt 1382, 1391 (1983), respondent cannot apply "principles of res judicata" against petitioner, who "argu[ed] at each phase of the disciplinary process that he was disciplined without fair notice for conduct which was made misconduct ex post facto." More significant is the fact that the constitutional issues raised in the disciplinary proceedings against petitioner never have been "determined by a competent court," Ibid.

"[O]ne general limitation ... repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a full and fair

opportunity to litigate that issue in the earlier case," Allen v McCurry, 449 US 90, 95, 101 SCt 411, 415 (1980). In other words, "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation," Montana v United States, 440 US 147, 165, 99 SCt 970, 979 (1979). The procedure followed in the disciplinary proceedings against petitioner was so unfair that he had no meaningful opportunity to litigate the due process issues raised again in the reinstatement proceedings.[19]

In the disciplinary proceedings, respondent reacted to petitioner's motion to dismiss the charges for want of fair notice by abrogating procedural due process

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[19]Of course, a party alleging denial of any fair opportunity to litigate an issue in the previous case is entitled to litigate his allegation, or the limitation is illusory.

as "inappropriate in the disciplinary system."[20] In the reinstatement proceedings, respondent ruled that the abrogation of procedural due process is now res judicata.

"Because res judicata may govern grounds and defenses not previously litigated, ... blockade[] unexplored paths that may lead to truth, ... shield[] the fraud and the

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[20]Under respondent's unconstitutional procedure, the factfinding committee recommends a disposition of a motion to dismiss or clarify for want of fair notice together with a disposition on the factual merits of the charges. A recommendation to deny the motion is a recommendation to make findings on the charges. A recommendation to grant the motion is a recommendation to dismiss the charges without findings, which cannot be reliable without fair notice and "opportunity for explanation and defense," In re Ruffalo, 390 US 544, 550, 88 SCt 1222, 1226 (1968). Respondent's factfinding committees, however, always make factual findings on the charges, even when recommending dismissal without findings, and respondent considers such findings as "the factual record in the case," thus defeating the constitutional purpose of minimizing "the risk of erroneous decisions," Addington v Texas, 441 US 418, 425, 99 SCt 1804, 1809 (1979).

cheat as well as the honest person, ... it ... is to be invoked only after careful inquiry," Brown v Felsen, 442 US 127, 132, 99 SCt 2205, 2210 (1979). Careful inquiry uncovers multiple dimensions of misuse in respondent's invocation of res judicata. First, the vagueness and overbreadth issues of the construction of DR6-101(A)(3) and DR7-101(A)(1) to obligate counsel to pursue client objectives "as they see them" in "fidelity to the client's judgment," previously litigated but unresolved in the disciplinary proceedings, are shielded from further challenge. Then the procedural due process issue of the unconstitutional motions procedure that shielded the vague, overbroad construction and denied petitioner a right to be heard on the fair notice issue in the first instance is shielded, although also litigated and unresolved in the disciplinary proceedings.

Finally, the Sixth Amendment and First Amendment issues of respondent's unconstitutional construction obligating counsel to "assume the role of advocate for clients who desire to plead guilty," ostensibly an outgrowth, actually the policy objective of the vague, overbroad construction of DR6-101(A)(3) and DR7-101(A)(1),[21] is shielded from challenge, and petitioner must "recognize the seriousness of the conduct that resulted in his suspension" by agreeing to honor this new, unconstitutional obligation in order to be reinstated as a member of respondent's bar in good standing.

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[21]Respondent's construction seems to follow from obligation of "fidelity to the client's judgment:" the client's decision to enter a guilty plea must, in respondent's view, obligate the attorney to seek this objective by advocacy. In petitioner's view, such advocacy usurps the prerogative of the accused to articulate their pleas personally to assure voluntariness.

It is clear that none of these constitutional issues have been "previously available," Brown v Felsen, 442 US at 131, 99 SCt at 973, to petitioner in the disciplinary or reinstatement proceedings and that all remain unresolved.

Respondent should not be permitted to misuse the common law res judicata doctrine to shield multiple constitutional violations, including abrogation of procedural due process in bar disciplinary proceedings and subversion of the guarantee of assistance of counsel for defense in criminal prosecutions.

CONCLUSIONS

To promote disposition of criminal prosecutions in DC courts by guilty pleas, respondent has construed "the canons of ethics" unconstitutionally to obligate counsel for the accused to be advocates for

guilty pleas. For the sake of this policy, respondent has abridged freedom of speech and restricted expression of ideas in the practice of criminal law and has misused the doctrine of res judicata to shield these constitutional violations from legal challenge. Respondent's judgment applying this policy should be reviewed.

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APPENDIX

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DISTRICT OF COLUMBIA COURT OF APPEALS

No. 88-1492

IN RE: JOHN J. STANTON, PETITIONER.

A Member of the Bar of the District of Columbia Court of Appeals

On Report and Recommendation of the Board on Professional Responsibility

(Argued October 24, 1990 Decided April 18, 1991)

Before BELSON and FARRELL, *Associate Judges*, and MACK, *Senior Judge*.

Opinion per curiam.

Dissenting statement by *Senior Judge* MACK at p. 7.

PER CURIAM: Petitioner was suspended from the practice of law for a year and a day because of several disciplinary violations. *In re Stanton*, 470 A.2d 272 (D.C. 1983) (*Stanton I*).[1] Before us is his second petition for reinstatement filed pursuant to D.C. Bar Rule XI, § 21 (5), now Rule XI, § 16 (d).[2] We conclude that petitioner's

[1] The same day, petitioner was suspended for a concurrent sixty-day period for violations of the same disciplinary rules which occurred when he represented other criminal defendants in Superior Court. *In re Stanton*, 470 A.2d 281 (D.C. 1983) (*Stanton II*), *cert. denied*, 466 U.S. 972 (1984).

[2] Rule XI was revised effective September 1, 1989.

A true Copy.
Test:
RICHARD B. HOFFMAN
Clerk of the District of Columbia Court of Appeals
BY
DEPUTY CLERK

request for reinstatement is foreclosed by principles of *res judicata*: he has offered no reason why the decision of the court denying his first petition for reinstatement is not binding on this division of the court. Independently, we also deny reinstatement substantially for the reasons stated by the Board on Professional Responsibility, whose opinion we adopt in the particulars set forth below.

In *In re Stanton*, 532 A.2d 95 (D.C. 1987) (*Stanton III*), we held that petitioner had not demonstrated by clear and convincing evidence his fitness to resume the practice of law under the standards enunciated in *In re Roundtree*, 503 A.2d 1215, 1217 (D.C. 1985). In particular, we looked to the second *Roundtree* criterion of whether respondent had recognized the seriousness of the misconduct that resulted in his suspension. We concluded:

> In our view, it is quite clear that petitioner refuses to acknowledge or appreciate the seriousness of his misconduct. For example, when asked at the hearing whether he had considered taking an ethics course during his suspension, he responded: "No. I have never had a problem knowing what the ethics rules require." And when questioned about his responsibility to a criminal defendant who wishes to plead guilty, petitioner made it clear that he would not act differently from the way he did before. *See Stanton I, supra*, 470 A.2d at 274; *Stanton II, supra*, 470 A.2d at 288. When asked at the hearing whether he would assume the role of an advocate for a client who desired to plead guilty, petitioner answered: "Not until after the plea is accepted. Then you start advocating for

> the best possible sentence. If the guilty plea is accepted, you lose the case, and the client gets convicted. Who wants to advocate for that kind of result?"

Stanton III, 532 A.2d at 97.

Upon examination of the present record, we conclude that nothing has changed with respect to petitioner's recognition of the seriousness of his misconduct. Indeed, what is remarkable is that the Hearing Committee in this case, in recommending reinstatement, made in essence the very point urged by Judge Mack in her concurring opinion in *Stanton III*, but which the majority rejected as insufficient to meet the *Roundtree* standard: That petitioner acknowledged his duties to advise his clients who wished to plead guilty, to participate in plea negotiations with the prosecutor, and to insure that any plea offer was clearly set forth on the record, but that he "would not *personally* articulate the guilty plea of a client" in court and would not "*personally* take any action to convince a judge of the voluntariness of a guilty plea of a client during a Rule 11 (d) inquiry." Report and Recommendations of the Hearing Committee, at 6 (emphasis by Committee); *see Stanton III*, 532 A.2d at 99 (Mack, J., concurring) (petitioner, while indicating that in the future he would not interfere with his client's plea and would act as an advisor, "did state . . . that he would not *personally* articulate a client's plea of guilty in court") (emphasis in original). *Stanton III* made clear, however, that petitioner was being denied reinstatement because he still "would not assume the role of an advocate for a client who desired to plead guilty," *id.* at 97, which included advocating in open court. *See Stanton I*, 470 A.2d at 276 ("Nevertheless, in direct contravention of his client's often-repeated

desire to plead guilty, respondent refused in open court to take any affirmative action to further his client's desires in the matter").

In *Stanton III*, in addressing petitioner's procedural challenge to the fairness of the proceedings leading to his suspension, the court accepted the rule that principles of *res judicata* apply in bar discipline cases so as to prevent litigation of defenses raised, or that might have been raised, in prior disciplinary proceedings. 532 A.2d at 96. The same rule necessarily governs petitioner's showing with respect to acknowledgment of the seriousness of his misconduct: if petitioner's understanding of his ethical duty is exactly the same as it was at the time of *Stanton III*, then he has had a full and fair opportunity to offer that understanding in satisfaction of the *Roundtree* standard, and he will not be heard – by a division of the court – to do so again. Otherwise petitioner could continually apply to the court for reinstatement while adhering to an understanding of his obligation which the court has found contrary to the duties imposed by the canons of ethics on an attorney representing a criminal defendant.

Even if principles of *res judicata* did not bar petitioner's application, we nevertheless would deny the instant petition because we agree with the Board on Professional Responsibility – whose findings we give "great weight," *Stanton III*, 532 A.2d at 97 – that petitioner has not met his burden of proof with respect to the other *Roundtree* factors.[3] First, the Board found that

> [l]ittle evidence was introduced on the Petitioner's activities since his suspension. He was employed

[3] Those factors are, first, the attorney's conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent

> as a paralegal during some portions of his suspension but, other than a few exhibits consisting of legal memoranda he wrote, he introduced no evidence about the dates of his employment, whether it was full or part-time, or of any other work he did.

Second, the Board found that, although petitioner was obliged to introduce affirmative evidence of his good character, "[n]o evidence was introduced concerning Petitioner's present character." We agree with the Board's reasoning that

> [g]ood character is an important element in a reinstatement proceeding, and every petitioner, regardless of the basis for the suspension or disbarment, must present proof on this issue. The amount of proof needed will likely vary with such factors as the length of the suspension and the circumstances surrounding the misconduct, but it is never an issue to be ignored, as Petitioner did here.

Finally, we agree in substance with the Board's finding in regard to petitioner's showing of present qualifications and competence to practice law:

> Petitioner presented minimal evidence of his legal competence. He introduced a document listing the cases he tried *before* his suspension and some brief memoranda he prepared in his post-suspension paralegal position; he also testified

---

future ones; second, the attorney's present character; and third, the attorney's present qualifications and competence to practice law. *In re Roundtree*, 503 A.2d at 1217.

about his paralegal work, some of which appeared to involve legal research while other aspects consisted of document organization and fact investigation. There was no testimony about the duration of his paralegal work and, significantly, no testimony from any lawyer who supervised or evaluated his work.

At the time of the hearing (February, 1989), Petitioner had been suspended over four-and-one-half years. Given such a lengthy period of absence from lawyering, Petitioner was obliged to present much more evidence of his present competence to practice law. Testimony from those in a position to evaluate Petitioner's present ability would have been particularly important; evidence of steps the Petitioner has taken to maintain his competence in the law would also have been useful. There was, however, no testimony from anyone for whom Petitioner worked or provided services concerning the level of his competence. Nor did Petitioner himself provide any evidence of steps he has taken to maintain his legal skills.

Thus, while we do not conclude that Petitioner is lacking in qualifications and competence to practice law, we do conclude, based on his failure to present any worthwhile evidence concerning his present learning in the law, that he has not satisfied his burden of proof on this *Roundtree* factor.

In sum, because petitioner has offered no reason why we are not bound by the prior decision denying him reinstatement, and because he has not demonstrated by clear and

convincing evidence his fitness to resume the practice of law, the petition for reinstatement must be dismissed.

So ordered.

MACK, *Senior Judge*, separate statement, dissenting: This case illustrates graphically the concept that law is a specialized language. Mr. Stanton has made impressive progress in the mastery of that language. As a practical matter, no one having evaluated Mr. Stanton's performance in this present appeal (during which he performed the difficult feat of representing himself in a petition for reinstatement to the Bar) could seriously doubt his competence as a lawyer. Indeed, the issues surfacing as a result of his successive appeals, the conclusion of the present division's majority that we are bound by the principle of *res judicata*, coupled with the diverse reasoning of the Board and the Hearing Committee, lead me to suggest that the question of Mr. Stanton's reinstatement may indeed necessitate further language, coming not only from petitioner, but from this court. Without extensive treatment, I will express my concerns:

1. At oral argument, Bar Counsel expressed an appreciation for the guidance of the *Roundtree*[1] criteria in consideration of requests for reinstatement. Petitioner agreed that *Roundtree* was indeed instructive. Petitioner recited fac-

[1] *See In re Roundtree*, 503 A.2d 1215 (D.C. 1985).

tors[2] which he thought to be relevant to each criterion, but suggested, as did the Hearing Committee,[3] the possibility that rigid application of such criteria could result in abuse. With respect to the second criterion (the criterion that a petitioner making a request for reinstatement must recognize the seriousness of his misconduct), I read Mr. Stanton as saying *that where the so-called misconduct involves an unresolved question on a litigated issue*, the criterion should

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[2] Petitioner listed queries relevant to the five criteria essentially as follows:

1. Nature and circumstances of the misconduct.
   What did counsel do? Was he incompetent, corrupt, uncooperative, evasive? Did the misconduct cause harm or prejudice to a client? Is there a record of prior discipline?

2. Recognition of the seriousness of conduct.
   Was there evidence on insight, lessons learned, thoughtful consideration?

3. Conduct since imposition of discipline.
   What steps have been taken to remedy the wrong? Has there been restitution or service of the public interest? Has counsel been sued, arrested, *etc.*?

4. Present character.
   Is there evidence of dishonesty, character disorders, selfishness? Carelessness? Is counsel thoughtful, concerned about justice and others?

5. Present qualifications
   What is the nature of counsel's work? Has he remained close to legal practice? Is there evidence reflecting his legal ability?

[3] The Hearing Committee expressed its concern by stating that it was "uncomfortable" with the "rigid application" of the criteria. [Report and Recommendation of the Hearing Committee at 3.]

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not require an applicant in every case to express insincere remorse and contrition, but only to represent that "I have given this thoughtful consideration in light of my disciplinary experience" [and hopefully, "I will not repeat this conduct once the question is resolved"]. I find little reason to disagree with petitioner in this respect (nor would, I hope, my colleagues in the final analysis). However, petitioner, in seeking to maintain his position that he has done nothing wrong, has not only led Bar Counsel to repeat, in understandable frustration, that petitioner's "attitude is still the same," but has been extremely successful in focusing the attention of this court on the merits and the pitfalls of the plea bargaining process to the exclusion of other issues. Thus, during oral argument petitioner was closely questioned as to what he would do in the future with respect to (1) negotiating a plea with the government, (2) advising his client with respect thereto, (3) assisting his client in making a decision, and (4) "implementing" that decision. His representations, essentially those recited before the Hearing Committee, were that he would negotiate with the government to get the best possible plea, would act as an "advisor" at all times but not an "advocate," would assist his client in deciding to waive trial but not in "implementing" the waiver of trial. He told the court that "[it is the] accused [who must] accept the consequences of their decisions." See also the colloquy recited in *In re Stanton*, 532 A.2d 95, 99 (D.C. 1987) (*Stanton III*) (Mack, J., concurring).

Therefore, it is not remarkable that the Hearing Committee recommended reinstatement. It did not simply repeat in essence the very point made by my concurring opinion

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in *Stanton III*, but made its own assessment, going one step further, as follows:

> Petitioner states he would not *personally* articulate the guilty plea of a client. Nor would petitioner *personally* take any action to convince a judge of the voluntariness of a guilty plea of a client during a Rule 11 (d) inquiry. He would, however, act as an advisor to the client as this inquiry is proceeding.
>
> While one may disagree with petitioner's view of his role in this context, we do not find his position as he has now framed it to be irresponsible, necessarily inconsistent with his obligations under the disciplinary rules, or in conflict with the rules of criminal procedure.

[Report and Recommendations of the Hearing Committee at 6.]

Although my concurring opinion did not speak to the question of whether a lawyer *personally* should seek to convince a judge of the voluntariness of a guilty plea, I cannot, in retrospect, believe that it is required or even uniformly desirable. Over the years "plea-bargaining" has become just that—"bargaining." The extent to which it has become part and parcel of the criminal justice system raises cause for scrutiny. We have forgotten that in the not too distant past, agreements between prosecutors and defendants were cause for serious concern. *See Machibroda v. United States*, 368 U.S. 487 (1962). Indeed it was not until 1970 that the United States Supreme Court began to talk of the "mutuality of advantage" (to the State and to the defendant) flowing

from the entry of a guilty plea (*Brady v. United States*, 397 U.S. 742, 752-53 (1970)) and the following year to recognize that " 'plea bargaining' is an essential component of the administration of justice" which if "[p]roperly administered . . . is to be encouraged." *Santobello v. United States*, 404 U.S. 257, 260 (1971).

Proper administration of the bargaining process requires preservation of a record in compliance with the dictates of Rule 11 of the Federal Rules of Criminal Procedure (or rather our corresponding Super. Ct. Crim. R. 11). Rule 11 does not require a lawyer to vouch for his client's credibility. Indeed the very purpose of the Rule 11 inquiry is to assure that an accused is *voluntarily* surrendering a panapoly of constitutional rights. *See McCarthy v. United States*, 394 U.S. 459 (1969); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). Central to the plea and foundation for entering judgment is the defendant's admission in open court that he committed the acts charged in the indictment (*Brady v. United States, supra*, 397 U.S. at 748) and that he is voluntarily offering the plea because he is indeed guilty. In this era of multiple charges, pretrial detention, overburdened courts, mandatory sentencing, and crowded prisons, a defendant may be coerced into entering a plea of guilty for many reasons not associated with guilt. A defense lawyer, who as a matter of routine personally speaks to convince the court of the voluntariness of a plea of guilty, himself walks a tight rope on the periphery of ethical conduct. The issue in the final analysis may well be whether the request of his client is lawful or rationale.

Thus, Mr. Stanton's representations leave room for honest disagreement as to whether his future conduct would

pose the threat of disciplinary violations. I suggest, however (as did the Board), that an important consideration is not only what the disciplined lawyer would do in the future (an imprecise prediction at best) but what he has done in the past. The truth of the matter is that this esoteric exercise has drawn attention away from the first criterion of the *Roundtree* case – "the nature and circumstances" of the prior misconduct.

2. Petitioner was disciplined for neglect and for intentionally failing to seek his client's lawful objective. *See In re Stanton*, 470 A.2d 272 (D.C. 1983) (*Stanton I*), and *In re Stanton*, 470 A.2d 281 (D.C. 1983) (*Stanton II*), *cert. denied*, 466 U.S. 972 (1984). In the factual context in which these violations arose there is a basic overlap; it is clear that there is more at issue than petitioner's attitude toward plea bargaining or his understanding of his role as an "advocate" in that process. In failing to communicate with clients, in failing to investigate charges, in failing to file bond review motions, in failing to honor his clients' rational and lawful requests, whether done intentionally as not being necessary or in the best interests of his clients, or unintentionally as a result of negligence, petitioner has done a disservice to his clients. By petitioner's own account, one of the factors to be balanced in assessing a record of prior discipline for reinstatement purposes is the question of "harm" or "prejudice" to a client. Such prejudice is apparent from the recitation of petitioner's conduct described in prior decisions of this court, incorporating the opinions of the Board on Professional Responsibility. Apart from overt prejudice, the psychological prejudice that may result has been eloquently expressed. In pointing out the special duty that a

lawyer owes to an indigent and incarcerated client, the Board has noted:

> The one person in the complex criminal justice system who is supposed to be unreservedly devoted to the interests of such a client is the appointed lawyer. When that lawyer ignores the views of the client, the client is left completely without assistance in a world that is then unrelievedly hostile.

See Stanton II, supra, 470 A.2d at 287.

Unless petitioner is prepared not only to advise his clients but to carry out their lawful and rational requests, he will be denying to the accused the very right that purportedly he has risked his career to fight for – the right of the accused to make a voluntary decision and thus to accept the consequences of that decision. The Hearing Committee, in recommending conditional reinstatement with a one year monitored probationary period, has told us that petitioner has said under oath that he is so prepared.[4] In light of this

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[4] The Committee noted:

> If *Roundtree* requires a confession of prior error, Petition[er] did not do so.
>
> • • • •
>
> Nevertheless there is record evidence that Petitioner recognizes that the conduct for which he was disciplined was both serious and in need of modification. Specifically, Petitioner has agreed to file bond review motions whenever clients request them, act more diplomatically with clients, and investigate cases more thoroughly. Moreover, he has agreed not to inform judges hearing guilty pleas of Peti-

representation, and because our differences are drawing uncomfortably close to an exercise in semantics, I would vote for the disposition recommended by the Hearing Committee. At the same time, I would remind Mr. Stanton that, where there is no question of professional ethics involved, such question does arise when counsel ignores the legitimate requests of an informed client, poor or rich. I would add that, under appropriate circumstances, it is neither difficult nor diminishing to say "I was wrong."

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tioner's advice to his client not to plead guilty. Petitioner has also testified that he has studied the Disciplinary Rules and agrees to carry them out and avoid violations.

[Report and Recommendations of the Hearing Committee at 5-6.]

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**DISTRICT OF COLUMBIA -
COURT OF APPEALS**

Filed OCT 02 1991

No. 88-1492

In the Matter of
JOHN J. STANTON
A Member of the Bar of the
District of Columbia
Court of Appeals

BEFORE: Rogers, Chief Judge, Ferren, Terry, Steadman, Schwelb, Farrell,* and Wagner, Associate Judges, and Mack* and Belson,* Senior Judges.

O R D E R

On consideration of petitioner's petition for rehearing/rehearing en banc and the opposition thereto, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

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